

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	}	
	}	
VS.	}	CRIMINAL ACTION NO. H-06-33
	}	
KELVIN ZACHARY NEWMAN	}	(C.A. 4:07-cv-4581)

OPINION & ORDER

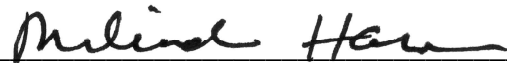
Pending before the Court are Movant Kelvin Zachary Newman's ("Newman") Motion to Vacate under 28 U.S.C. §2255 (Doc. 38), the Government's response thereto (Doc. 46), and the Government's Motion to Dismiss (Doc. 47). The Magistrate Judge's Memorandum and Opinion (Doc. 59) was filed on July 21, 2008. Newman's Objections (Doc. 60) to the Memorandum and Opinion were then filed August 11, 2008. For the reasons explained below, the Court fully adopts the Memorandum and Recommendation.

Newman raises only one objection. He argues his counsel was ineffective by failing to point out at sentencing that the prior conviction used to sustain the enhancement of his sentence under 21 USC § 851 was not a felony conviction. Although it was charged as a felony, he argues he was prosecuted and convicted of a misdemeanor under Texas Penal Code §12.44(b). This argument was not raised in Newman's § 2255 motion and is, therefore, a successive petition. The Antiterrorism and Effective Death Penalty Act of 1996 amended 28 U.S.C. § 2253 to require a certificate of appealability ("COA") before a successive petition can be filed. *See* 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). Because

Newman is required to obtain a COA before the Court can consider his new argument, his objection, which is a successive motion, must be dismissed for lack of subject matter jurisdiction.

Accordingly, the Court ADOPTS the Magistrate Judge's Recommendation in full, DENIES Newman's § 2255 motion (Doc. 38).and GRANTS the Government's Motion to Dismiss (Doc. 46).

SIGNED at Houston, Texas, this 29th day of July, 2009.

A handwritten signature in black ink, appearing to read "Melinda Harmon", is written over a horizontal line.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE